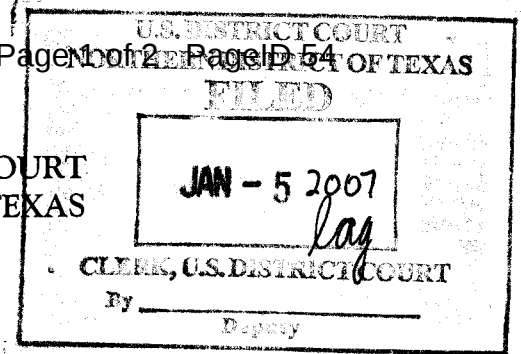


IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



BEN LYNDON KISER, ID # 433579,)
Petitioner,)
vs.)
NATHANIEL QUARTERMAN, Director,)
Texas Department of Criminal)
Justice, Correctional Institutions Division,)
Respondent.)

No. 3:06-CV-1200-M
ECF

ORDER ACCEPTING FINDINGS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

After reviewing the objections to the Findings, Conclusions, and Recommendation of the United States Magistrate Judge and conducting a *de novo* review of those parts of the Findings and Conclusions to which objections have been made, I am of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court.

Petitioner does not dispute that he is no longer in custody on a 1968 robbery conviction that resulted in a sixty-five year sentence (which was ultimately reduced to five years in 1969). Although his petition specifically challenges the 1968 conviction, petitioner now objects that the Magistrate Judge failed to construe the petition as a challenge to the conviction for which he is currently serving a life sentence (hereinafter referred to as the "holding conviction") because it was enhanced by the 1968 robbery conviction. Petitioner also objects to the application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217, to the instant action because his conviction arose long before the statute's enactment.

Petitioner's objection regarding the application of AEDPA is foreclosed by his prior habeas action challenging his 1986 conviction for aggravated sexual assault of a child and the resulting life

sentence. See *Kiser v. Johnson*, 163 F.3d 326, 326-29 (5th Cir. 1999). In that prior action, the Fifth Circuit reiterated that AEDPA "applies to all habeas petitions filed after the AEDPA went into effect." *Id.* at 327. That petitioner's challenged conviction occurred long before enactment of AEDPA provides no basis for rejecting or modifying the findings, conclusions, and recommendation of the Magistrate Judge.

With respect to petitioner's objection regarding the construction of his challenge, the Court likewise finds no basis to reject or modify the findings, conclusions, and recommendation. Notwithstanding petitioner's failure to assert a claim regarding the enhancement of his current sentence prior to his objections to the recommendation, no reasonable basis exists for construing the instant action as a challenge to his 1986 holding conviction given that he has already unsuccessfully challenged it. See *id.* at 326-29 (affirming *sua sponte* dismissal of petitioner's prior habeas challenge to his 1986 conviction and life sentence as untimely). Because petitioner has not obtained authorization to file a successive habeas petition to challenge that 1986 conviction and resulting sentence, the Court lacks jurisdiction over any purported challenge thereto in this action.

For all of these reasons, the Court finds no merit to petitioner's objections to the findings, conclusions, and recommendation of the Magistrate Judge. It hereby finds the Findings and Conclusions of the Magistrate Judge correct and accepts them as the Findings and Conclusions of the Court.

SO ORDERED this 5th day of January, 2007.


UNITED STATES DISTRICT JUDGE